No. 83-2077

In The

Supreme Court of the United States

October Term, 1984

LARRY DIXON,

Petitioner,

vs.

LINDSEY M. SCOTT, RICHARD L. KELLEY and LARRY LATHAM,

Respondents.

BRIEF OF RESPONDENTS RICHARD L. KELLEY AND LARRY LATHAM, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Must a 42 U.S.C. §1983 plaintiff allege and prove that he has no adequate postdeprivation due process remedy and is he precluded, as a matter of law, from claiming §1983 jurisdiction if he admits that he has a tort remedy under state law?

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STATEMENT OF THE CASE

These Respondents adopt the Petitioner's Statement of the Case.

SUMMARY OF ARGUMENT

The Plaintiff/Respondent cannot invoke the jurisdiction of §1983 because he has an adequate postdeprivation remedy under state tort law. Therefore, he has not been deprived of any rights "without due process of law".

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ARGUMENT

The avowed purpose of a responsive brief, as set out by Rule 22 of this Court, is to disclose ". . . any matter or ground why the cause should not be reviewed by this Court." For this reason, these Respondents initially had not intended to file a responsive brief as they fully agree with the Petitioner that Certiorari should be granted. As this Court has directed the Respondents to submit a brief, this opportunity will be taken to briefly elaborate on the basis on which Certiorari should be granted. The question presented, as set out by Petitioner is

> Must a Section 1983 plaintiff allege and prove that he has no adequate postdeprivation due process remedy and is he precluded as a matter of law from claiming §1983 jurisdiction if he admits that he has a tort remedy under state law?

The answer is yes under the decisions of this Court in *Parratt v. Taylor,* 451 U.S. 527 (1981) and *Ingraham v. Wright,* 430 U.S. 651 (1977).

However, it does not appear that all the Federal Courts of Appeals and District Courts concur and this calls for an exercise of the Supreme Court's power of

supervision, a basis for granting a Writ of Certiorari under Rule 17.1(a).

In the instant case, the due process issue is controlling but the Eleventh Circuit Court of Appeals totally ignored it and limited its discussion on appeal to the issues of state action and immunity.

As this Court reiterated in *Parratt v. Taylor, supra,* there are four separate and distinct elements necessary to establish a valid claim under 42 U.S.C. §1983. These are (1) a deprivation of, (2) a right privilege or immunity secured by the Constitution or laws under, (3) the color of state law and, (4) without due process of law.

The first three elements, in and of themselves, are insufficient to establish a violation of the Fourteenth Amendment.

> Nothing in that amendment protects against all deprivations of life, liberty or property by the state. The Fourteenth Amendment protects only against deprivation "without due process of law". *Baker v. McCollan,* 443 U.S. 137, 145 (1979); *Parratt, supra* at 537.

If it is assumed, without deciding, that the alleged actions of the defendants below deprived the Plaintiff/Respondent of "liberty" within the meaning of the Fourteenth Amendment, then the focus of attention must be on whether or not this was done "without due process of law". *Rutledge v. Arizona Bd. of Regents,* 660 F.2d 1345, 1352 (9th Cir. 1981).

In the present case, the Eleventh Circuit erred in not focusing, addressing, or even mentioning, the controlling issue of due process.

This presents a somewhat strange situation since the Eleventh Circuit has now belatedly delivered a cogent analysis of this exact point in *Gilmere v. City of Atlanta,* (No. 82-8457, 11th Circuit, decided July 9, 1984 Slip. Op. p.4473).

The time has now come for the Supreme Court to clarify the purpose of §1983 and place it in its proper perspective.

> Section 1983 was not meant to supply an exclusive remedy for every alleged wrong committed by state officials. Rather, the statute is a remedy for only those wrongs which offend the constitutional prohibition against . . . deprivation without procedural due process. *Vickery v. Walton,* 721 F.2d 1062, 1065 (6th Cir. 1982).

The issues are simply what is due process and is it available in the remedies provided by the state courts.

As this Court noted in *Parratt,* due process is an "opportunity to be heard . . . in a meaningful time and in a meaningful manner." *id.* at 540; *Armstrong v. Manzo,* 380 U.S. 545 (1965).

That meaningful opportunity is adequately provided in postdeprivation remedies if a predeprivation hearing is impractical and a postdeprivation hearing provides meaningful redress. *Parratt, supra.* Obviously, in isolated incidents of wrongdoings such as false arrest, police brutality, etc., any type of predeprivation hearing is impractical and, in fact, impossible. However, the civil and criminal remedies provided by state law are sufficient if they afford significant protection. *Ingraham, supra.*

Therefore, "the issue becomes merely whether the remedies available under [Georgia] law and in the

[Georgia] courts constitute the postdeprivation hearing required by the Fourteenth Amendment". *Rutledge v. Arizona Bd. of Regents, supra* at 352. Here, the plaintiff is provided with a "whole panalopy of remedies." *Barnier v. Szentmiklosi,* 565 F.Supp. 869 (E.D. Mich. 1983). The Plaintiff/Respondent acknowledges this in his complaint as he seeks to invoke pendant jurisdiction of the U.S. District Court to pursue claims for false imprisonment under Ga. Code Ann. §105-901 (now O.C.G.A. 51-7-20); malicious prosecution under Ga. Code Ann. §105-801 (now O.C.G.A. 51-7-40), and false arrest under Ga. Code Ann. §105-1001 (now O.C.G.A. 51-7-1).

The Plaintiff/Respondent has a fully adequate remedy in money damages under Georgia law. There is no need that the plaintiff have the same rights to damages under state law as he would have under federal law or even that the rights need to be as extensive. *Parratt, supra.* The controlling factor is whether or not the Georgia Courts provide a means of redress which will fully compensate the plaintiff for his alleged injury. *Parratt, supra.*

As set out above, the plaintiff has a tort action under Georgia law and there is no reason to believe the Georgia Courts would not be as determined to prevent such wrongs as the Federal Courts would be. *Ellis v. Hamilton,* 669 F. 2d 510 (7th Cir. 1982).

Parratt opened the floodgates to the Federal Courts by holding that negligence could provide a basis for deprivation of rights which could be asserted under §1983. If the resulting flood of claims is not controlled by limiting Federal jurisdiction to claims for which there is no ade-

quate remedy under state law, "then the Fourteenth Amendment becomes a font of tort law to be superimposed upon whatever systems may already be administered by the states." *Paul v. Davis,* 424 U.S. 693, 701 (1976), *Parratt, supra.*

Simply, when a postdeprivation remedy is available to a plaintiff which will adequately compensate him, he is relegated to his remedies under tort law in the State Courts. *Rutledge, supra.*

The remaining issue for clarification, and the one which has caused the greatest conflict between the Courts, is whether *Parratt* is limited to its facts, that is, the negligent deprivation of property, or does its scope include the intentional deprivation of life and liberty as well.

The Fourteenth Amendment itself provides no basis to differentiate between life, liberty and property but provides equal dignity for each.

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

This Court has already addressed this specific issue in *Ingraham* which involved corporal punishment and therefore included intentional acts resulting in personal injury and explicated that there was no violation of §1983 because of the "common law safeguards that already exist". *Ingraham, supra* at 682.

Once you assume that a postdeprivation remedy can cure a negligent act, that principle applies equally to rendom and unauthorized intentional acts. *Palmer v. Hudson,* 697 F.2d 1220, 1223 (4th Cir. 1983).

Just as "nothing in language of §1983 or its legislative history limits the statute solely to intentional deprivation of constitutional rights", *Parratt,* at 534, the converse is likewise true. Nothing in its language or history limits its application to negligent acts.

Obviously, the ruling in *Ingraham* controls intentional acts and there is no purpose to be solved by further complicating §1983 by including any state of mind standard, whether intentional, negligent or even strict liability. *Vickery, supra.* In fact, all that does is simply direct a plaintiff's attorney to allege in his complaint that the actions were done negligently and/or intentionally.

The logical conclusion that *Parratt* cannot be restricted solely to negligent deprivations of property has been applied by several courts. *Gilmere v. City of Atlanta, supra; Ellis v. Hamilton, supra; Palmer v. Hudson, supra; Rutledge v. Arizona Bd. of Regents, supra; Barnier v. Szentmiklosi, supra; Vickery v. Walton, supra.*

However, not everyone has gotten the word. *See, Tarkowski v. Hoogasian,* 532 F.Supp. 791 (N.D. Ill. 1982); *Scott v. Donovan,* 539 F.Supp. 255 (N.D. Ga. 1982); *House v. DeBerry Correctional Inst.,* 537 F.Supp. 1177 (M.D. Tenn. 1982). There even remains some controversy within the Supreme Court itself concerning the expansion or limitation of *Parratt* as noted by the concurring opinions of Justices Blackmun and White.

The Respondent Scott, in his brief to this Court, contends that the *Parratt* decision is not controlling because he has challenged a state procedure and that the state procedure itself constitutes a denial of due process and there-

fore this case comes within the purview of *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

However, he has not shown a deprivation as a result of an established state procedure but, at best, has raised a factual question as to whether the actions of the defendants constituted state action so as to fulfill the "color of state law" requirement of §1983.

Logan is inapplicable because the deprivation alleged in the instant case was not pursuant to an established state procedure. Rather, the deprivation, if one occurred, was allegedly due to a random and unauthorized abuse of a valid state procedure. Very simply, Scott alleges the improper issuance and service of an arrest warrant. If this were to constitute a denial of due process by established state procedure, then every action which was done under color of state law would result in a federal claim. In any false arrest or police brutality case, there would be deprivation under established state procedure since it is state law which empowers the police officers to arrest or take someone into custody. Obviously, this is not the intent nor purpose of §1983.

In *Gilmere v. City of Atlanta, supra, Logan* is distinguished and the rationale there likewise applies to the present case. In *Gilmore,* the Eleventh Circuit noted that *Parratt* involved a random and unauthorized act by a state employee and was not the result of some established state procedure such as in *Logan.* In *Logan,* the State had, by operation of law, destroyed the plaintiff's property and *Parratt* was simply not designed to cover that situation. *Ingraham, supra,* was also differentiated from

Logan, because State Court remedies provided adequate postdeprivation due process.

> In the instant case, unlike the situation in *Logan,* the plaintiff did not prove a deprivation caused by an established state procedure. The deprivation was caused instead by an unpredictable and unauthorized act. *Parratt* shows that in such a case due process can be satisfied by an adequate postdeprivation hearing, e.g., a state tort suit. *Gilmore,* text slip op. at 4491.

In *Gilmere,* as in the present case, it is *Parratt* and *Ingraham* which are controlling and *Logan* is inapposite.

This controversy should be resolved and the time has again come for this Court to put its shoulder to the wheel to provide assistance to the various Courts of Appeals and District Courts in their struggle to analyze claims such as the present one that are commonly thought of to state a claim for a common law tort normally dealt with by the state courts, but instead are couched in terms of constitutional deprivations and relief sought under §1983. *Parratt, supra* at 533.

The burdens on the Federal Courts grow daily and, in the twelve month period ending June 30, 1982, seventeen thousand cases were filed in the U.S. District Courts alleging deprivations of civil rights. *Barnier v. Szentmiklosi, supra.* To grant the Writ of Certiorari and clarify the meaning of *Parratt* would allow this Court to stem that tide and put the common law tort claims back where they belong, in the state court systems.

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CONCLUSION

The Plaintiff/Respondent was not denied "due process" and has fully adequate remedies in the Courts of Georgia. Certiorari should be granted to relegate this claim to its proper forum, the State Courts, and to clarify the scope of *Parratt v. Taylor, supra.*

Respectfully submitted,

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